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CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1950.

No. 361

W. J. SIMMS, WILLIAM S. ROSECRANS, EDWARD W. COST, CARRIE D. GRIBBLE, ZELLA Z. McCOMB, MERCHANTS NATIONAL REALTY CORP., a corporation, and SECURITY-FIRST NATIONAL BANK OF LOS ANGELES, a national banking association,

Petitioners,

vs.

COUNTY OF LOS ANGELES, a body corporate and politic, and CITIES OF GARDENA, VERNON, MONTEREY PARK, and CLAREMONT, municipal corporations,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

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COUNTY OF LOS ANGELES, a body corporate and politic, and CITIES OF GARDENA, VERNON, MONTEREY PARK, and CLAREMONT, municipal corporations,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

Petitioners, a national bank and landlords of national banks, pray that Writ of Certiorari issue to review the judgment of the Supreme Court of the State of California entered May 2, 1950 [R. 331] reversing judgments of the California Superior Court in favor of each of petitioners. Judgments in the trial court had ordered refund of local taxes on "real property" because of "discrimination" in violation of paragraph 3 of 12 U. S. C. 548 (R. S. 5219) and the Equal Protection clause of the Fourteenth Amendment of the Constitution of the United States. Petition for rehearing was filed May 17, 1950 [R. 332] and denied June 1, 1950 [R. 439]. Extension of time for filing this petition until October 16, 1950 was granted by this Court [R. 442].

Opinions Below.

The two opinions of the Superior Court [R. 130-137; R. 223-231] are not reported. The opinion of the Supreme Court of the State of California [R. 317-330] is reported in 35 Advance California Reports 332 (217 Pac (2d) 936). The Supreme Court of the State of California rendered no opinion in entering its order denying rehearing [R. 439].

Jurisdiction.

Jurisdiction of this Court is invoked under 28 U. S. C. 1257 (3) and 2101 (c). Drawn into question is construction by the California Supreme Court of rights, privileges, and immunities under:

(a) Paragraph 3 of 12 U. S. C. 548 (R. S. 5219);

(b) The Equal Protection clause of the Fourteenth Amendment of the Constitution of the United States;

(c) The Due Process clause of the Fourteenth Amendment of the Constitution of the United States.

As to (a) and (b), such questions were properly raised by initial pleadings in the trial court [R. 5-7; 36-38; 143-145][1] and were expressly found by it to have been violated in the levy of the taxes on petitioners' "real property" [R. 108-110; 216-217]. But the California Supreme Court in its judgment held such to be *not* vio-

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[1]By stipulation the printed record includes only the complete record in the following cases as typical:

Security-First National Bank v. County of Los Angeles, Superior Court No. 48544, Supreme Ct. No. L. A. 20967 (taxes for 1942) as representative of the five national bank cases [R. 139-231];

W. J. Simms v. County of Los Angeles and *Carrie D. Gribble v. County of Los Angeles,* Superior Ct. Nos. 476894 and 477115, Supreme Ct. Nos. L. A. 20964 and L. A. 20965, tried jointly (taxes for 1941) as representative of the 18 landlord cases [R. 1-138].

Only the Superior Court judgments in the omitted cases have been included in the printed record [R. 232-268].

Where matter is identical, subsequent references are to ***Security-First National Bank v. County of Los Angeles,* No. L. A. 20967.**

lated, except as to certain "special assessment" taxes [R. 322-326; 326]. The last, (c), arose for the first time by reason of the disregard by the court below in its judgment of vested rights of petitioners under the Federal statute and Constitution; it was timely raised on petition for rehearing [R. 347; 388-396].

Constitutional Provisions and Statutes.

Pertinent provisions of the Fourteenth Amendment are contained in Section 1 thereof reading as follows:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The pertinent provision of R. S. 5219 involved is paragraph 3 conditionally authorizing State *ad valorem* taxation of "real property" of national banks upon the following terms:

> "Nothing herein shall be construed to exempt the real property of associations from taxation in any State or in any subdivision thereof, to the same extent, according to its value, as other real property is taxed."

Sections 2, 9, 10, and 16 of Article XIII of the California Constitution are involved herein. California Statutes involved are: (1) Provisions of the California Revenue and Taxation Code relating to the "assessment roll" (Sections 601, 602, and 607); (2) Provisions of said Code relating to "equalization by County Board of Equalization" (Section 1611); (3) Provisions of said Code relating to "payment under protest and suit to recover" (Sections 5136-5143); (4) Provisions of said Code relating to "enforcement of tax after erroneous proceedings" (Sections 4946-4948); and (5) Section 4a of the California Bank and Corporation Franchise Tax Act relating to taxation of national bank income. Pertinent provisions appear in the Appendix.

Questions Presented.

Questions presented by this petition are:

1. Whether local taxation of national bank fixtures as real property is authorized by Paragraph 3 of R. S. 5219 when all other fixtures of the same class are taxed to others, if at all, as personal property?

2. Whether an arbitrary administrative classification, in effecting a tax discrimination between taxpayers of the same class and similarly situated, is a violation of the Equal Protection clause?

3. Whether an arbitrary administrative imposition of taxes on buildings owned by landlords of national banks including discriminatory taxes upon fixtures owned by their tenants is a violation of the Equal Protection clause and R. S. 5219 when buildings owned by all other landlords, as a class, are not taxed for tenant-owned fixtures?

4. Whether it is proper, in determining the extent of local taxes levied on national bank fixtures, arbitrarily classified as real property, to consider the effect of a state tax, imposed solely on national and state banks to compensate for the tax exemption required by paragraph 3, R. S. 5219, when such state tax is computed at a rate dependent upon personal property taxes, paid by non-banking corporations, and such rate was necessarily increased because all fixtures of non-banking corporations were classified as personal property?

5. Whether action by a state court of last resort refusing a taxpayer relief by way of tax recovery judgment granted him by an unassailed and unambiguous State statute, because of a "policy" declared by such state court for the first time in its decision, is a denial of Due Process of Law when, under the facts found, the taxpayer was entitled to recovery of its taxes as invalid under both Paragraph 3 of R. S. 5219 and the Equal Protection clause?

Summary Statement.

Facts: There are no disputed issues of fact. Basic facts were stated by the California Supreme Court in its opinion [R. 317-330] and are set forth below to the extent material:

> "These are appeals from judgments for plaintiffs in twenty-three actions brought to recover taxes paid under protest on certain buildings. In five cases, the building involved was owned and occupied by a national bank which sought recovery for each of the tax years 1942 through 1946. In the remaining cases, the buildings were leased to and occupied by national banks but were owned by different landlords who sued separately for return of sums paid during the period 1941-46, inclusive." [R. 317].
>
> ". . . plaintiffs applied to the county board of equalization for reductions in the assessed valuations of their improvement in amounts equal to the value of bank vault doors and counterlines* installed in their buildings and included in the assessments. The applications were made upon the theory that substantially all property similar to bank vault doors and counterlines had been assessed as personal property, and that the assessment of bank vault doors and counterlines as improvements to realty was therefore discriminatory. The requested relief being denied by the board, plaintiffs paid the taxes under protest and instituted actions for recovery." [R. 317-318].
>
> "For several years prior to 1940 the Los Angeles County Assessor, . . . followed the general practice of classifying bank vault doors and counterlines as personal property. No ad valorem taxes were paid thereon since the personal property of national banks is exempt from local taxation . . . in 1940, however, the assessor reclassified and assessed vault doors and counterlines installed in buildings used for banking purposes as part of the building improve-

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"*The word 'counterlines' is used to denote combinations of counters wickets, grilles, partitions, etc."

ments or real estate . . ." [R. 318; based on findings of trial court, R. 180; 194].

"In each of the tax years involved in the present appeals, bank vault doors and counterlines installed in plaintiffs' buildings were classified as real property and, without being separately valued, were included with the buildings in assessments of improvements. During that period, however, as to property other than that occupied by banks it was the assessor's general practice to classify and assess as *personal* property certain articles, machinery and equipment installed in buildings for purposes of trade, commercial or industrial uses. Typical of this practice was the treatment accorded to more than sixty items of property, including, among others, vault doors and counterlines of jewelers and furriers, refrigerators and counters in public markets, restaurant counters and booths, office partitions, printing presses of metropolitan newspapers, and a variety of heavy industrial machinery such as boilers, ovens and generators." [R. 318-319; based on findings of trial court, R. 180-189.]

"The trial court found and concluded that in classifying and assessing banking fixtures as improvements, the assessor had intentionally, deliberately and without justification deviated from his general practice with regard to the classification and assessment of fixtures, and that such differences in treatment of similar property constituted discrimination against plaintiffs prohibited by various provisions of the federal and state constitutions and by section 5219 of the Revised Statutes of the United States (12 U. S. C. A. §548)." [R. 319; based on findings and conclusions of trial court, R. 199-200; 214.] "It also determined that since bank vault doors and counterlines were included with each building in a single assessment of improvements, the invalid and otherwise valid portions of each assessment were indivisible and consequently all taxes levied thereon were void." [R. 319; based on findings and conclusions of law

of trial court, R. 200-201, 214-217.] "Judgments were accordingly entered for plaintiffs, and these appeals followed." [R. 319; judgments, R. 114-117, 220-222.]

Proceedings Before California Supreme Court: The State Supreme Court adopted all factual findings made by the trial court [R. 318-319]. It held petitioners had complied procedurally with State statute [R. 319-320]. It concluded that national bank fixtures had been correctly classified under State statute as "real property" but all comparable articles (which would not be exempt from taxation if classified as personal property) had been "misclassified" as personal property [R. 320]. Under California law, it held that assessments for tax purposes varying from those made on property of like character would be "invalidated" when, as in this proceeding, the assessor's "deviation" from general practice was "intentional," "deliberate" and not "justified" [R. 321].

In reversing judgments entered in the trial court for petitioners the State Supreme Court approved certain legal conclusions reached by the trial court and disapproved others. It recognized that had bank fixtures received "the same classification accorded fixtures generally, they would have been exempt from taxation" [R. 322]. But relying upon the State tax definition it held that to grant bank fixtures similar "misclassification" would give them "unwarranted exemption" [R. 322]. Contrary to the trial court, the State Supreme Court declared that neither R. S. 5219 [R. 325] nor the Equal Protection clause [R. 324] protected bank fixtures from an "intentional," "deliberate" and "unjustified" tax *classification* different from that accorded other comparable fixtures.

Contrary to the trial court, the State Supreme Court held petitioners' assessments to be "valid" unless a tax "burden" (by reason of resultant taxes) was imposed in

excess of that put on fixtures "misclassified" as personalty [R. 323]. Since fixtures assessed as personal property had been subjected to general city and county taxes at the same rates and in the same proportion of value, it seems to have concluded that petitioners' assessments for general taxes were valid [R. 323-324] but for special assessment taxes (not levied on personal property) were "invalid" [R. 326].

The trial court held that all taxes on petitioners' buildings were "void" [R. 216-217] and entered judgments accordingly [R. 220-222]. As indicated in its opinion [R. 230] respondents would not lose thereby any valid taxes on petitioners' buildings because such buildings were subject to reassessment under State statute [R. & T. C. 4946-4948; App. pp. 5-7] by which back taxes could be collected along with and in addition to current taxes. The State Supreme Court in each of such cases held the special assessment taxes only to be "invalid" [R. 326]. It did not discuss the reassessment statute.

The State Supreme Court rested its judgment almost wholly upon the conclusion that tax "discrimination" prohibited by R. S. 5219 and the Equal Protection clause can be found only in a discriminatory "tax burdens" [R. 324]. In the same decision it found: that Section 4a of the California Bank and Corporation Franchise Tax Act imposed a special and additional "in lieu" tax upon national banks not levied upon non-banking corporations [R. 325-326]; that the rate of this tax was computed by reference to the amount of personal property taxes, including taxes on fixtures assessed as personalty, paid locally by non-banking corporations [R. 326]; but that such tax was levied by and on behalf of the State, not its local entities [R. 326]. It concluded that this State tax should not be considered because "discrimination," it asserted, cannot be shown by "proof of injury resulting from the act of a different and independent taxing agency" [R. 323-324].

The State Supreme Court adopted the trial court's conclusion that the assessments on petitioners' buildings were indivisible and the court had no power to divide them [R. 326-327]. Contrary to the judgments as entered by the trial court which included recovery of all taxes in controversy [R. 130-137; 223-231] subject to right of reassessment [R. 230], the State Supreme Court ordered the trial court to secure from the county board of equalization a determination of the value of the buildings, with bank fixtures excluded, and, based thereon, to enter judgment for petitioners only for special assessment taxes upon the value of the bank fixtures [R. 329-330]. The State Supreme Court ignored requirements of the State tax recovery statute [R. & T. C. 5141; App. p. 5], the limited powers and duties of a county board of equalization [Cal. Const. Art. XIII, Sec. 9, App. p. 2; R. & T. C. 1611, App. p. 3] and the State reassessment statute [R. & T. C. 4946-4948, App. pp. 5-7]. It held it was contrary to "policy" to deprive public bodies of revenue in order to refund taxes void in substantial part and which the court itself could not separate between valid and void parts [R. 327].

The State Supreme Court found that landlords of banks were the *only* landlords taxed for tenants' improvements [R. 324] and thus they had been compelled to pay county and city taxes upon tenants' fixtures, not paid by any other landlords [R. 324]. Contrary to the decision of the trial court,[2] it restricted recovery by petitioner landlords to special assessment taxes upon their tenants' bank fixtures [R. 324].

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[2]The trial court concluded that the taxation to the national bank landlords of tenant-owned bank fixtures was "void" as in violation of the Equal Protection clause [R. 109] and R. S. 5219 [R. 109-110].

The State Supreme Court allowed recovery of the special assessment taxes only because no similar taxes were imposed on personal property and therefore no defense of "equivalency" could be interposed as to the special assessment taxes.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

1. So Long as a State Generally Classifies and Taxes Fixtures as Personal Property, It Has No Power to Classify and Tax National Bank Fixtures as "Real Property"; Taxes so Levied in Order to Evade Restrictions of R. S. 5219 Constitute "Discrimination."

National banks are agencies of the United States, created under its laws to promote its fiscal policies. They may be taxed by states only in strict conformity with the consent of Congress. *Des Moines National Bank v. Fairweather,* 263 U. S. 103, 106; *First National Bank v. Anderson,* 269 U. S. 341, 347; *Owensboro National Bank v. Owensboro,* 173 U. S. 664, 667-669. As to tangible property, this congressional consent is found only in paragraph 3 of R. S. 5219. No consent is given thereby for states to tax *personal* property. *Owensboro National Bank v. Owensboro, supra; Rosenblatt v. Johnston,* 104 U. S. 462, 463.

Congressional consent, thereunder, to taxation of national bank-owned "real property" is limited to taxes thereon "to the same extent, according to its value, as other real property is taxed." This phase, or slight variant thereof, has been incorporated by Congress in substantially all provisions permitting limited state taxation of property of various federal agencies.[3] Its importance is not restricted to petitioners or to national banks generally.

A state, for tax purposes, may define for itself what constitutes "real property" and such definition will apply

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[3]Reconstruction Finance Corporation, 15 U. S. C. 607 (c. 334, §5, 62 Stat. 265);

Commodity Credit Corporation, 15 U. S. C. 713a—5 (c. 44, §5, 52 Stat. 108);

Federal Credit Union, 12 U. S. 1768 (c. 3, §4, 51 Stat. 4);

Federal Farm Mortgage Corporation 12 U. S. C. 1020-f (c. 33, 48 Stat. 360);

Federal Home Loan Bank, 12 U. S. C. 1433 (c. 150, §8, 49 Stat. 295);

Federal Reserve Bank, 12 U. S. C. 531 (c. 101, §1, 40 Stat. 1314);

to and authorize state taxation under the federal statute as "real property." *Reconstruction Finance Corp. v. Beaver County,* 328 U. S. 204, 210. Such state definition must, however, "not effect a discrimination against the Government or patently run counter to the terms of the Act." (*Ibid.*)

But "discrimination" may also result from the manner in which a statute is applied. *Iowa-Des Moines National Bank v. Bennett,* 284 U. S. 239, 244-45; *Montana National Bank v. Yellowstone County,* 276 U. S. 499, 504. Elimination by *administrative* definition of all other fixtures from the terms of the uniform California statute, with consequent classification and taxation, if at all, as personal property, is as inharmonious with the Congressional consent as would be a statute to the same effect. Compare *Hamilton National Bank v. District of Columbia,* 156 F. (2d) 843, 846. (C. A. D. C.); *Ibid.* (Second Appeal) 176 F. (2d) 624, 630, certiorari denied 338 U. S. 891.

The trial court held that, if national bank fixtures had received the *general* classification, they would have been exempt from taxation under Section 5219 [R. 213]. Factually such was conceded by the State Supreme Court [R. 318]. This finding should have determined the controversy in favor of petitioners. The State Supreme Court, however, held that this would give national bank fixtures an "unwarranted exemption" [R. 322]. But power of Cali-

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Home Owners Loan Corporation, 12 U. S. C. 1463-c (c. 621, 56 Stat. 986);

Federal Deposit Insurance Corporation, 12 U. S. C. 264-p (c. 62, §1, 57 Stat. 65);

Federal Savings and Loan Insurance Corporation, 12 U. S. C. 1725-e (c. 150, §22, 49 Stat. 298);

Production Credit Association, 12 U. S. C. 1138-c (c. 98, §63, 48 Stat. 267).

Additionally by 1947 enactment Congress has employed the phrase "to the same extent" as limiting the authority to levy on governmental transactions many forms of state taxation of an excise character. 4 U. S. C. 104-106.

fornia to tax national bank fixtures does not exist because, under statute law or otherwise, they are "real property." If a State fails to tax land and buildings owned by state-chartered banks, it cannot under R. S. 5219 tax land and buildings of a national bank. *Covington City National Bank v. City of Covington,* 21 Fed. 484, 487. (Cir. Ct. D. Ky.) The power flows only from compliance with conditions expressed in the phrase "to the same extent, according to its value, as other real property is taxed."

These words in tax statutes have long been construed to mean "in the same manner." *People v. Feitner,* 167 N. Y. 1, 8; 60 N. E. 265, 268. On analogous situation the Court of Appeals for the District of Columbia in the second appeal in *Hamilton National Bank v. District of Columbia, supra,* p. 630, said:

> "So long as the taxing authorities of the District of Columbia classify as 'incorporated savings banks' the state-chartered commercial banking institutions which have interest-bearing savings deposits, and impose upon them the form of taxation set up in §1703, the national banks in the District which have interest-bearing savings deposits must be classified and taxed in the same manner." (Cert. denied, 338 U. S. 891.)

Likewise on identical facts with this proceeding, was the decision of the Oregon Supreme Court in *First National Bank of Portland v. Marion County,* 169 Ore. 595, 613-616; 130 P. (2d) 9, 16-17. It held taxes levied upon national bank fixtures assessed as real property to be "void" when all similar fixtures had been assessed as personal property.[4]

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[4]The conclusion of the Oregon Court was stated as follows (p. 16):

> "If trade fixtures are classified as personal property for the purpose of taxation, they must be taxed, if at all, as personal property, and not as realty."

Respondents' only power to tax national bank "real property" was thus *on condition* that real property of others be taxed "in the same manner" including classification thereof as real property. Congressional permission to tax the national bank fixtures involved herein was transgressed when the Congressional condition was not fulfilled. The "discrimination" in classification was nonetheless action by the state although the county assessor in failing to give the required "real property" classification to all other fixtures acted contrary to the law of the state. *Iowa-Des Moines National Bank v. Bennett,* 284 U. S. 239, 244-45; *Montana National Bank v. Yellowstone County,* 276 U. S. 499, 504-505. The assessor's failure to comply with the terms of the Congressional consent under R. S. 5219 rendered the national bank fixtures and the buildings, with which they had been indivisibly assessed during the period, "exempt" from state taxation, until by proper reassessment proceedings, uniform in character with assessments made of similar property owned by others, assessments of petitioners' buildings were brought within the terms of the Congressional authority.

2. So Long as a State Classifies and Taxes Fixtures, if at All, as Personal Property, the Equal Protection Clause and R. S. 5219 Require Like Treatment of National Bank Fixtures.

The Equal Protection clause protects the taxpayer from State action which selects him out for discriminatory treatment. It guarantees him "the right to equal treatment." *Hillsborough Township v. Cromwell,* 326 U. S. 620, 623; *Sioux City Bridge Co. v. Dakota County,* 260 U. S. 441, 445-447; *Iowa-Des Moines National Bank v. Bennett,* 284 U. S. 239, 245-246.

The right to equal treatment includes the right to similar "classification." Compare *Hamilton National Bank v. District of Columbia,* 176 F. (2d) 624, 630; *ibid.* (first appeal) 156 F. (2d) 843, 846. Conclusion by the State Supreme Court that had national bank fixtures been given

the same classification applied to other fixtures, they would have been "exempt" [R. 318] required further declaration that petitioners' taxes were prohibited by both the Equal Protection clause and R. S. 5219 and therefore national bank fixtures were "exempt" from local taxation.

In reversing the trial court which so held [R. 213] the California Supreme Court concluded that arbitrary withholding of a benefit granted others (*i. e.,* classification as personal property) is not within the purview of the Equal Protection clause [R. 324]. Decisions of this Court have long held that its prohibition is aimed at "undue favor and individual or class privilege" as well as "oppression." *Truax v. Corrigan,* 257 U. S. 312, 332-333.

While recognizing that equal treatment of national bank fixtures would have required them to be treated as exempt "personal property," the State Supreme Court negatived such result upon the ground that the California statute as construed by it in *Trabue-Pittman Corp. v. County of Los Angeles,* 29 C. (2d) 385, 393; 175 P. (2d) 512, 518, declared them to be "real property" [R. 320]. Under the Equal Protection clause and R. S. 5219 the right to equal treatment is paramount over requirement of statute, even though such results in exemption from state taxation. *Hillsborough Township v. Cromwell, supra; Montana National Bank v. Yellowstone County,* 276 U. S. 499, 503-504.

3. So Long as a State Generally Taxes Buildings Owned by Landlords Without Tenant-Owned Fixtures, the Equal Protection Clause, and R. S. 5219 Require Similar Taxation of Buildings Owned by Landlords of National Banks.

The State Supreme Court acknowledged equal treatment required that buildings owned by national bank landlords should not be taxed for any purpose for their bank tenants' fixtures [R. 324]. Nevertheless, it reversed the tax recovery judgments for petitioner land-

lords, except as to special assessment taxes, upon the ground that each landlord "may" "by contract protect himself against increases in taxes that result from improvements to the building by tenants" [R. 324]. Most landlords of national banks did not protect themselves [R. 83].

On the contrary, decisions of this Court hold that an otherwise invalid tax cannot be justified upon the ultimate resting place of its economic burden nor upon an assumed right of reimbursement by a landlord from his lessee. *United States v. Allegheny County*, 322 U. S. 174, 189. See also: *Builders Club v. United States*, 14 Fed. Supp. 1020, 1022-3 (Ct. Cl.); *Electric Storage Battery Co. v. McCaughn*, 54 F. (2d) 814 (D. C. E. D. Pa.), affirmed 63 F. (2d) 715 (3rd C. C. A.). Particularly is this so if the only party to whom the economic burden could be transferred is itself exempt from payment of such tax when uniformly levied, and its effect is to evade a required exemption. Compare *United States v. Allegheny County, supra*, 188.

4. "Discrimination" in Violation of R. S. 5219 and the Equal Protection Clause Is Not Excused by Levy of Personal Property Taxes on Other Misclassified Fixtures.

This Court has long held in cases involving power of a State to tax property of a federal agency that mere "equivalency" in amount between an unauthorized tax and a valid tax or that the unlawful tax represented no more than "what might have been done," will not bring taxes, in fact levied beyond the bounds of Congressional consent, within the authority of R. S. 5219. *Owensboro National Bank v. Owensboro*, 173 U. S. 664, 683; *First National Bank of Gulfport v. Adams*, 258 U. S. 362,

365. The question is one of power, not of amount. Lack of power cannot be justified by claimed fairness in imposing a similar tax on other property admittedly subject to state taxation. Compare *Freeman v. Hewit,* 329 U. S. 249, 254; *Fairbank v. United States,* 181 U. S. 283, 291.

To the contrary, the State Supreme Court concluded that discriminatory tax classification was not prohibited under R. S. 5219 so far as general county and city taxes were concerned, because "misclassified" fixtures of others were subjected to similar taxes. For such holding it erroneously relied upon decisions of this Court in *Tradesmen's National Bank v. Oklahoma Tax Commission,* 309 U. S. 560, and *Amoskeag Savings Bank v. Purdy,* 231 U. S. 373. These decisions were not concerned with power of a State to tax national bank real property nor with the provisions of paragraph 3. They considered state taxes levied on national bank shares and on national bank income authorized, if at all, by paragraph 1(b) or 1(c). Conditions placed upon Congressional consent under these paragraphs are far different from that of paragraph 3, depending not upon similarity of treatment, but upon the "rate" of tax levied on other competing "moneyed capital" or income of non-banking income. In the cited decisions this Court has held that the word "rate" so used refers to *all* taxes levied on competing "moneyed capital" or of other corporations income irrespective of the number of other taxes involved or the manner in which the other taxes were levied. Such construction of a different form of Congressional consent is neither applicable nor persuasive here.

Also "discrimination" prohibited by the Equal Protection clause applies to withholding an "undue favor and individual or class privilege" granted others, as well as to direct unequal "oppression." *Truax v. Corrigan,* 257 U. S. 312, 323-333.

5. Assuming Arguendo Validity of Tax Equivalence Contention, the State Supreme Court Disregarded Decisions of This Court as to What Constitutes Equivalency.

Under Section 4a of the California Bank and Corporation Franchise Tax Act, there is levied by the State for State purposes an additional "in lieu" tax on national bank income not levied on income of non-banking corporations. The State Supreme Court in its decision construed the rate of this tax to be computed "by reference to the amount of local personal property taxes paid by non-banking corporations" [R. 323]. The State tax was designedly imposed to avoid the effect of the local personal property exemption of national bank personal property under R. S. 5219 and the California Constitution [Summary Report, California Tax Bureau, R. 422-430]. It was fixed at the *highest* sum which the State believed it could tax without "discrimination against either banks or corporations" [*ibid.*, R. 424]. Many of the "sixty items of property" found to be "typical" of general "classification" of fixtures as personal property were owned by non-banking corporations.[5] For the California court to consider only taxes *locally* levied on "misclassified" fixtures was to consider but *part* of the taxes imposed under California law by the State and local entities on national banks in relation to their personal property. *Hopkins v. Southern California Telephone Company*, 275 U. S. 393, 403. To impose locally on national bank fixtures both a discriminatory tax based upon their classification as "real property" and at the same time for a State to levy an "in lieu" tax on national bank income based upon the assumption that such articles were exempt

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[5]The index to trial exhibits set forth in "consolidated supplement to Clerk's Transcripts on appeal" discloses such ownership.

from local taxation is akin to double-taxation. Compare *Hopkins v. Southern California Telephone Company, supra,* where on similar record without showing of rates or amounts involved, this court held a local tax so levied to be invalid under the Equal Protection clause.

The State court gave as its reason for refusing to consider the effect of such additional state tax that a claim of "discrimination" could not be supported "by proof of injury resulting from the act of a different and independent taxing authority" [R. 324]. This Court under the Equal Protection clause has held that taxes imposed by all agencies, state and local, are to be regarded as having been levied by "one tribunal" and assessments made under both as "one judgment." *Greene v. Louisville & Interrurban R. R. Co.,* 244 U. S. 499, 518. For purpose of determining whether the Congressional consent under R. S. 5219 has been complied with, or limitations of the Equal Protection clause met, acts of all state and local officials involved must be "treated as if merged in a single officer." *Iowa-Des Moines National Bank v. Bennett,* 284 U. S. 239, 244-245. In the later of the two cases relied upon by the State Supreme Court (*Tradesmen's National Bank v. Oklahoma Tax Commission,* 309 U. S. 560, 567-568) this Court held that, when it was required to determine the extent of state taxes on income of non-banking corporations, it was necessary to make "an examination of the whole tax structure of the state."

Even though the equivalency doctrine relied upon by the California Supreme Court were valid, which it is not under prior decisions of this Court (*supra,* pp. 15-16), on the facts of this case it could not support the judgment below. When the State-imposed tax is properly taken into consideration, "discrimination" in taxes on national bank fixtures is apparent on any theory.

6. In Withholding From Petitioners Full Recovery of Their Invalid Taxes Contrary to Decisions of This Court and as Required by Valid State Statute, the Judgment of the California Supreme Court Was a Denial of Due Process of Law.

A declaration by a court of last resort, as in this case, that a taxpayer has been wronged in violation of Federal Statute or Constitution requires more than such admission of wrongdoing. A taxpayer's constitutional right includes the right to judgment by the state court refunding *in full* the invalidly exacted taxes. *Montana National Bank v. Yellowstone County,* 276 U. S. 499, 504-505; *Iowa-Des Moines National Bank v. Bennett,* 284 U. S. 239, 247.

By statute, California recognizes this duty [R. & T. C. 5136-5143, App. pp. 3-5]. Thereunder, a wronged taxpayer is entitled to pay a tax, invalid because of "void assessment," under protest and to sue and recover judgment refunding him *all* taxes based on such void assessment. In compliance with this statute the trial court entered judgments refunding petitioners *all* taxes paid on their invalid building assessments [R. 130-137; 223-231] subject to respondents' later right to reassess the buildings constitutionally in accordance with the method applied uniformly to other buildings [R. & T. C. 4946-4948, App. pp. 5-7; for reliance thereon by the trial court see R. 230.]

The California Supreme Court, in reversing the trial court and refunding to petitioners only special assessment taxes, intentionally and deliberately denied to them the relief expressly provided by state statute in such cases and thereby left in the public treasury the major portion of the invalid taxes previously exacted. Moreover, it never questioned the validity of the state statute it ignored nor its clear and unambiguous meaning.

These suits were conducted pursuant to specific statutory procedure [R. & T. C. 5136-5143, App. pp. 3-5]. For a taxpayer to prevail thereunder the trial court *must*

find "that the *assessment* complained of is *void* in whole or in part" [R. & T. C. 5141, App. p. 5]. The statute prescribes that the resulting judgment shall be for "the amount of taxes paid on *so much* of the *assessment* as is found to be *void*" [R. & T. C. 5141, App. p. 5].

The trial court found that, under the circumstances of this case, assessment of national bank fixtures as "real property" was prohibited by both R. S. 5219 [R. 215] and the Equal Protection clause [R. 215]. Because the fixture portions of the assessments were judicially indivisible from assessments on the remainder of petitioners' buildings, it held them *entirely* "void" [R. 214-215]. Such latter determination, upon the facts of this proceeding, was required by decisions of this Court. *Santa Clara County v. Southern P. R. Co.*, 118 U. S. 394, 416; *California v. Central R. R. Co.*, 127 U. S. 1, 45. The judgment of the trial court [R. 220-222] for recovery of all taxes "paid" on their building assessments was the *only* judgment authorized [R. & T. C. 5141, App. p. 5].

The State Supreme Court approved all factual findings made by the trial court [R. 318-319]; it recognized that equal treatment required classification of bank fixtures as personal property with consequent exemption from local taxation [R. 319]; and it found under California law that "if the taxing authorities 'resort to arbitrary methods varying from those employed in assessing other property of like character and situation, and resulting in the imposition designedly of an illegal burden on the part of the complainant' " the resulting assessments would be "invalidated by the courts" [R. 321].

Without consideration of facts so found or its own declaration as to applicable law, the State Supreme Court ignored the invalidity of the *assessments* and regarded the case as one involving only invalidity of subsequently imposed *taxes*. It referred to taxes on each building as being in part "valid" and in part "invalid" [R. 326]. But there was only *one* assessment each of petitioners' building, regardless of the number or kinds of taxes extended

against it [R. 169]. In California there cannot be a valid tax for any purpose levied on a *void* assessment. Cal. Const. Art. XIII, Sec. 10 (App. p. 1); *People v. Hastings*, 29 Cal. 449, 451; *Universal Consolidated Oil Co. v. Byram*, 25 Cal. 2d 353, 361. In ordering the trial court to refund only special assessment taxes the State Supreme Court ordered a judgment in defiance of statute.

The statute places the duty upon the court to determine the extent of the "void" assessment [R. & T. C. 5141, App. p. 5]. The trial court held it could not divide building assessments between fixtures and the remainder of the buildings [R. 200-201; 214-215; 228-230]. The California Supreme Court approved this conclusion [R. 326-327]. Accordingly, in each case, the trial court held the assessment to be wholly void [R. 214-215]. But, nevertheless, the State Supreme Court ordered the trial court, in disregard of statute, to refer such assesments for division to the county board of equalization, a body entirely unauthorized by state statute or Constitution to make such separation. Cal. Const. Art. XIII, Sec. 9 (App. p. 2); R. & T. C. 1611 (App. p. 3).

The State Supreme Court excused this disregard of the statute-required judgment and the consequent denial to petitioners of their vested rights thereto upon the ground, for the first time so declared, of a *court* "policy" that to "require defendants to refund the valid portion of the special district taxes attributable to the value of plaintiff's buildings and to pay interest thereon" "would be contrary to the policy that the public should not be deprived of revenue necessary for the performance of governmental functions" [R. 327]. The California Supreme Court thus deliberately arrogated to itself, in violation of petitioners' vested Federal rights thereunder, authority to override a valid statute, an act which this Court has uniformly held not to be within the permissible limits of the judicial function. *Osborn v. Ozlin*, 310 U. S. 53, 66.

This Court, by Mr. Justice Brandeis in *Brinkerhoff-Faris Trust & Savings Co. v. Hill,* 281 U. S. 673, 679-680, has said:

> ". . . If the result above stated were attained by an exercise of the state's legislative power, the transgression of the due process clause of the Fourteenth Amendment would be obvious . . . The violation is none the less clear when that result is accomplished by the state judiciary in the course of construing an otherwise valid . . . state statute. The federal guaranty of due process extends to state action through its judicial as well as through its legislative, executive, or administrative branch of government."

Petitioners specifically raised their additional injury under the Due Process clause on petition for rehearing [R. 347, 388-396]. The California Supreme Court denied such petition [R. 439] without opinion or modification of its former judgment. Petitioners' additional Federal question was timely since raised at their first opportunity. *Missouri ex rel. Missouri Co. v. Gehner,* 281 U. S. 313, 319-320; *Brinkerhoff-Faris Trust & Savings Co. v. Hill,* 281 U. S. 673, 678.

CONCLUSION.

Wherefore, it is submitted that the Writ of Certiorari prayed for in the petition herein should be granted, and the judgment and order of the California Supreme Court should be reversed.

Respectfully submitted,

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